as switchmen,[8] firemen,[9] despatchers,[10], and car sealers.[11] In spite of the intimation to the contrary in the First Employers' Liability Cases,[12] it has been repeatedly held that men engaged in repair shops in repairing instrumentalities used indiscriminately in intrastate and interstate commerce, come within the purview of the act.[13]

The United States Supreme Court, however, in the principal case definitely decides that one engaged in making repairs in a roundhouse or shop upon an instrumentality used in interstate commerce is not subject to the act, for at such time the instrument is definitely withdrawn from all commerce. Running repairs are expressly distinguished, as are repairs of road, track and other permanent structures. This decision, besides having the effect of overruling, among others,[14] many state decisions, including those of California denying the applicability of the state law in such cases,[15] makes necessary a modification of the above test. In so far as employment rests upon the character of the instrumentality, the instrumentality must be appropriated or dedicated to actual service; and, being in service, the character of the instrumentality will be determined by the character of the traffic. Thus, by eliminating all employments preparatory to the commencement of commerce, the decision forces a reduction of all cases to the single principle, whether the instrumentality is in actual service in commerce—bridges, tracks and similar facilities being regarded for this purpose as in actual use.

W. A. S.

STATUTE OF LIMITATION: OPEN BOOK ACCOUNT.—When a merchant sells a bill of goods at a fixed price and charges the amount on his books, must he bring suit in two years as on a

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[8] Norfolk & Western Ry. v. Earnest (1912), 229 U. S. 114, 57 L. Ed. 1096, 33 Sup. Ct. Rep. 654; Pittsburgh etc. R. Co. v. Glinn (1915), 219 Fed. 148. The principal case still leaves doubtful the case of C. B. & Q. R. R. v. Harrington (1915), 241 U. S. 177, 60 L. Ed. 941, 36 Sup. Ct. Rep. 517.

[9] Lamphere v. Oregon R. & Nav. Co. (1912), 196 Fed. 336.

[10] Baltimore & Ohio v. I. C. C. (1910), 221 U. S. 612, 55 L. Ed. 878, 31 Sup. Ct. Rep. 621.

[11] St. Louis, S. F. & Texas R. Co. v. Seale (1912), 229 U. S. 156, 57 L. Ed. 1129, 33 Sup. Ct. Rep. 651

[12] First Employers' Liability Cases (1907), 207 U S. 463, 52 L. Ed. 297, 28 Sup. Ct. Rep. 141; Zikos v. Oregon R. & Nav. Co., supra, n. 5. Cf. 1 California Law Review 196.

[13] Northern Pac. R. Co. v. Maerkl (1912), 198 Fed. 1; Law v. Illinois Central R. Co. (1913), 208 Fed. 869; Chicago, K. & S. R. Co. v. Kindlesparker (1916), 234 Fed. 1.

[14] Supra, n. 13. The roundhouse or shop housing the instrumentality can no longer be regarded as an instrumentality of interstate commerce, for it took its character from the instrumentality housed. Thomas v. Boston & M. R. R. (1915), 219 Fed. 180.

[15] Southern Pacific Co. v. Pillsbury (1915), 170 Cal. 782, 151 Pac. 277; and modifying San Bernardino v. State Board of Equalization (1916), 172 Cal. 76, 155 Pac. 458, in so far as it covers the question of repairs.

simple contract not in writing,[1] or is he allowed four years as upon an open book account?[2] An open book account has been variously defined,[3] but it is generally agreed that an account is "open" only when there have been a series of uninterrupted or current dealings between the parties, which are kept unclosed with the expectation of further transactions between them,[4] or where some term of the bargain remains to be fixed, whether there is one item or several.[5]

Judged by either of these tests the result reached by the District Court of Appeal in *Merchants Collection Agency v. Levi*[6] is correct. Two items of goods had been sold to defendant on the same day at a fixed price and charged to him on the books. No payments were made or other items entered. Upon suit filed more than two years thereafter it was held that the transaction was barred by section 339 of the Code of Civil Procedure which covers simple accounts not in writing. In determining that this was not an open book account under the 1907 amendment to section 337, Code of Civil Procedure, the court announced as the test that "the debtor must have made payments which, being credited to him, would indicate his desire and intent that the account should remain open."[7] This interpretation results from the use of the words "balance due" which appeared in the old provision on mutual, open and current accounts[8] and which were carried over into the 1907 amendment which covered both mutual, open and current accounts and open book accounts.[9] But to apply this qualification to open book accounts is to restrict them in a manner unknown in other states and probably not contemplated by the legislature.

The view of merchants and the profession seems to have been that the amendment of 1907 extended the four year period of limitation to all book accounts not stated, whether of one item or many, or of fixed terms or not, and that as far as merchants' accounts were concerned section 339, Code of Civil Procedure,[10]

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[1] Cal. Code Civ. Proc., § 339, subd. 1.

[2] Cal. Code Civ. Proc., § 337, subd. 2.

[3] 1 R. C. L. 207, 25 Cyc. 1044, 6 Words & Phrases, 4984.

[4] Mercantile Trust Co. v. Doe (1914), 26 Cal. App. 246, 254, 146 Pac. 692; McCamant v. Batsell (1883), 59 Texas 363, 368; Wroten Grain & Lbr. Co. v. Mineola Box Mfg. Co. (1906), 95 S. W. (Tex.) 744; 1 Am. & Eng. Encyc. of Law 435.

[5] The Golden Rod (1907), 153 Fed. 171; Gayle's Adm'r v. Johnston (1882), 72 Ala. 254, 47 Am. Rep. 405.

[6] (Jan. 26, 1917), 24 Cal. App. Dec. 166.

[7] Supra, n. 6.

[8] Cal. Code Civ. Proc., § 344.

[9] Supra, n. 2.

[10] Before 1907 the two year period covered open book accounts along with other simple accounts not in writing. Adams v. Patterson (1868), 35 Cal. 122; Gwinn v. Hamilton (1885), 7 Pac. (Cal.) 837; Rocca v. Klein (1888), 74 Cal. 526, 16 Pac. 323.

no longer had any application, except as to accounts stated. It is highly desirable that merchants should know definitely when they must sue on their accounts. If the legislature did intend to affect all merchants' accounts by the amendment, it would perhaps be desirable, in view of the already settled meaning of the term "open book account,"[11] to remove further doubt by a rephrasing of the section.

An analysis of the principal case in its effect upon the Statute of Limitations in the various kinds of merchants' accounts gives the following results. If there are only one or two items clearly agreed upon and no payment on account, the statute is two years; even if payments have been made, the view in other states is that this is not an open book account.[12] There is no decision in California, but the period is probably two years. Where there is a series of transactions such as to constitute an open book account generally,[13] still in California the period of limitation is two years unless payments have been made, in which case it is four years. Where there are one or two items, the terms of which are in dispute, there is an open book account in other states,[14] but in California the statute runs in two years unless there is a balance due extending the period to four years. Why should not the legislature substitute for this variety of rules a simple, uniform, four year limitation for all merchants' accounts, including accounts stated? A suggested difficulty[15] in the latter case is that this will enable a merchant to wait for almost four years, then render a statement to reduce his claim to an account stated and add four years more. But practically, a merchant would not endanger his account by waiting so long merely to add another four year period to the one already given him.

J. G.

STATUTE OF LIMITATIONS: UNDERGROUND TRESPASSES: CONSTRUCTIVE FRAUD.—The statutes of most states simply provide that actions for trespass to realty shall be commenced within a certain time after the commission of the act, while actions in cases of fraud need only be commenced within a certain time after the discovery thereof. In the statutes of but few states is there a provision that actions for underground trespasses and unlawful removal of ore shall be commenced within a certain time after the discovery of the trespass.[1] In the absence of such a statute

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[11] Supra, notes 4 and 5.
[12] Supra, notes 4 and 5.
[13] Supra, n. 4.
[14] Supra, n. 5.
[15] Auzerais v. Naglee (1887), 74 Cal. 60, 67, 15 Pac. 371. For notes on Account Stated see 2 California Law Review 50, 3 California Law Review 317.

[1] Montana, Rev. Codes (1907), § 6449; New Mexico, Comp. Laws